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7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA
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10 UNITED STATES OF AMERICA,) 3:05-cr-00098-HDM
11) 3:10-cv-00531-HDM
12 Plaintiff/Respondent,)
13 vs.) ORDER
14)
15 JOHNATHON ROBERTS,)
16)
17 Defendant/Petitioner.)
18)
19)

20 Before the court is the defendant Johnathon Roberts'
21 ("Roberts") motion to vacate, set aside, or correct sentence
22 pursuant to 28 U.S.C. § 2255 (#377, #382, #383). The government
23 has responded (#396), and Roberts has replied (#404, #406).

24 **Factual History**

25 On May 1, 2005, Anthony Gonzalez ("Gonzalez") called Jared
26 Chapman ("Chapman") in search of a good price on approximately
27 1,400 Ecstasy pills. (Trial Tr. 200, 300-02). Chapman contacted
28 his sister's boyfriend, Jonathan Woodbridge ("Woodbridge"), who
Chapman knew had sold drugs in the past. (*Id.* at 200-01). After
Woodbridge said he could obtain the pills, Chapman called Gonzalez
back and arranged a meeting. (*Id.*)

That evening, Roberts and Gonzalez drove from Reno, Nevada, to

1 Sacramento, California. (*Id.* at 305, 792-93). After meeting up
2 with Chapman and Woodbridge, the four men drove in Roberts' car to
3 an apartment complex where Woodbridge was to obtain the drugs.
4 (*Id.* at 205, 307). Once there, Roberts and Gonzalez handed
5 Woodbridge \$4,300 for the purchase. (*Id.* at 206, 309, 802).
6 Instead of going into an apartment to purchase the pills, however,
7 Woodbridge took the money and left. (*Id.* at 206, 309-10).

8 Once he realized Woodbridge was not returning, Roberts got in
9 the back seat, pulled out a gun, and pointed it at Chapman. (*Id.*
10 at 210). He ordered Chapman, who was sitting in the back seat, to
11 crawl into the front seat, and directed Gonzalez to drive the car
12 back to Reno. (*Id.* at 210-11, 315). En route, Roberts told
13 Chapman that if he did not return the \$4,300 he was "not going to
14 make it to see tomorrow." (*Id.* at 214). Roberts also called Jacob
15 Belford ("Belford") and told him he needed his help and to meet him
16 at his house. (*Id.* at 315, 606, 819-20).

17 Upon reaching Roberts' house in the early morning hours of May
18 2, 2005, Roberts took Chapman inside at gunpoint and ordered him to
19 lie face down on the floor. (*Id.* at 217-18, 316). Belford and
20 Gonzalez then went to a store and bought zip ties, duct tape, and
21 rope, which they used to tie up Chapman. (*Id.* at 220, 324-37).

22 Gonzalez also bought a prepaid cell phone for Chapman to call
23 Woodbridge, family, and friends to get the stolen money back. (*Id.*
24 at 338-42). When Woodbridge refused to return the money, Chapman
25 called his mother. (*Id.* at 232). After retrieving \$2,500 of the
26 \$4,300 from Woodbridge and making up the difference with her own
27 money, Chapman's mother reported the kidnaping to the police, which
28 in turn contacted the FBI. (*Id.* at 61-62, 66-68).

1 In coordination with the FBI, Chapman's mother drove to Reno.
2 (*Id.* at 72-73). Pursuant to FBI instructions, she persuaded
3 Roberts and Gonzalez to meet her at the Reno Hilton. (*Id.* at 76).
4 In the early morning hours of May 3, 2005, Roberts and Gonzalez
5 arrived with Chapman at the Hilton, where they were then arrested.
6 (*Id.* at 111-12, 116).

7 The next day, May 4, 2005, investigators went to Roberts'
8 house and searched his garbage can. (*Id.* at 138-39). In it they
9 found duct tape, zip ties, and other evidence associated with the
10 kidnaping. (*Id.* at 139). After obtaining this evidence, the
11 investigators secured a search warrant for Roberts' house. (*Id.* at
12 156). Agents conducted a search of the house on May 5, 2005.
13 (*Id.*). There they found a number of firearms and other items
14 connected to the kidnaping. (*Id.* at 161-70).

15 **Procedural History**

16 On May 11, 2005, the grand jury returned an indictment
17 charging Roberts and Gonzalez with kidnaping and aiding and
18 abetting in violation of 18 U.S.C. § 1201 and 18 U.S.C. § 2. On
19 May 25, 2005, the grand jury returned a superseding indictment
20 adding another defendant, Nick Calcese ("Calcese"), and another
21 count, conspiracy to kidnap in violation of 18 U.S.C. § 1201(c).

22 On November 2, 2005, the grand jury returned a second
23 superseding indictment adding a charge of carrying a firearm during
24 a crime of violence in violation of 18 U.S.C. § 924(c). This
25 charge was levied against Roberts and Calcese but not against
26 Gonzalez. On November 30, 2005, the grand jury returned a third
27 superseding indictment adding Belford as a defendant and one count
28 of evidence tampering against Calcese.

1 Over the next several months, Belford, Calcese, and Gonzalez
2 all entered signed plea agreements. Roberts proceeded to trial.

3 On June 13, 2006, Roberts' counsel, Loren Graham ("Graham"),
4 moved to withdraw. The court granted the motion and appointed Marc
5 Picker ("Picker") to represent Roberts.

6 On July 22, 2006, Picker filed a motion to dismiss the
7 indictment, alleging that Roberts' right to a speedy trial had been
8 violated by the numerous continuances stipulated to by the parties
9 and granted by the court. On August 14, 2006, Picker filed a
10 motion to suppress evidence obtained in a warrantless search of the
11 vehicle Roberts drove to the Reno Hilton. At a hearing on August
12 17, 2006, the court denied both motions.

13 Trial commenced against Roberts on August 21, 2006. At trial,
14 Roberts asserted a defense of duress. On August 28, 2006, the jury
15 found Roberts guilty of all three counts of the third superseding
16 indictment. The court sentenced Roberts to concurrent terms of
17 imprisonment for the kidnaping and conspiracy to kidnap charges,
18 and a mandatory consecutive term of imprisonment on the § 924(c)
19 charge.

20 Roberts appealed his conviction. On March 20, 2009, the Ninth
21 Circuit affirmed. Roberts filed a petition for rehearing *en banc*,
22 which the circuit court denied. On August 25, 2010, Roberts filed
23 the instant § 2255 motion.

24 **Standard**

25 A convicted defendant may move to vacate, set aside, or
26 correct his sentence pursuant to 28 U.S.C. § 2255, if: (1) the
27 sentence was imposed in violation of the Constitution or laws of
28 the United States; (2) the court was without jurisdiction to impose

1 the sentence; (3) the sentence was in excess of the maximum
2 authorized by law; or (4) the sentence is otherwise subject to
3 collateral attack. *Id.* § 2255(a); see also *United States v. Berry*,
4 624 F.3d 1031, 1038 (9th Cir. 2010).

5 **Analysis**

6 Roberts asserts five grounds in support of his motion to
7 vacate. First, he claims that his trial attorney, Marc Picker,
8 rendered ineffective assistance of counsel in violation of his
9 Sixth Amendment rights. Second, he claims that his Fifth and Sixth
10 Amendment rights were violated when the court applied enhancements
11 to his sentence based on facts that were not presented to the jury.
12 Third, he claims that his Fourteenth Amendment rights were violated
13 because he was denied access to a law library when he was preparing
14 to represent himself for his sentencing. Fourth, he claims that
15 his pretrial attorney, Loren Graham, rendered ineffective
16 assistance of counsel by failing to protect his right to a speedy
17 trial. Finally, he claims that he did not receive a fair trial in
18 violation of his Fifth, Sixth, and Fourteenth Amendment rights
19 because the government knowingly presented the false testimony of
20 several witnesses.

21 I. Ineffective Assistance of Counsel - Attorney Marc Picker

22 Ineffective assistance of counsel is a cognizable claim under
23 § 2255. *Baumann v. United States*, 692 F.2d 565, 581 (9th Cir.
24 1982). In order to prevail on a such a claim, the defendant must
25 satisfy a two-prong test. *Strickland v. Washington*, 466 U.S. 668,
26 687 (1984). First, the defendant must show that his counsel's
27 performance fell below an objective standard of reasonableness.
28 *Id.* at 687-88. "Review of counsel's performance is highly

1 deferential and there is a strong presumption that counsel's
2 conduct fell within the wide range of reasonable representation."
3 *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir.
4 1986). Second, the defendant must show that the deficient
5 performance prejudiced his defense. *Strickland*, 466 U.S. at 687.
6 This requires showing that "there is a reasonable probability that,
7 but for counsel's unprofessional errors, the result of the
8 proceeding would have been different. A reasonable probability is
9 a probability sufficient to undermine confidence in the outcome."
10 *Id.* at 694.

11 Roberts' claims of Picker's alleged ineffectiveness fall into
12 four categories: (1) failure to call certain witnesses; (2) failure
13 to impeach certain witness testimony; (3) failures regarding
14 motions to suppress; and (4) failures regarding Roberts' speedy
15 trial rights.¹

16 A. Witnesses

17 Roberts asserts that Picker failed to call two witnesses who
18 would have testified on his behalf: Ernest Saragosa and Samuel

19
20 ¹ In his reply, Roberts claims that Picker was ineffective for failing
21 to introduce evidence of Gonzalez's violent criminal history as described
22 in Gonzalez's presentence report, for failing to elicit certain testimony
23 from Special Agent Glen Booth, who investigated the kidnaping, and for
24 failing to call a number of additional witnesses. These assertions were not
25 part of Roberts' petition or the two supplements thereto. Generally an
26 argument raised for the first time in a reply is considered waived and the
27 court need not consider it. See *Zamani v. Carnes*, 491 F.3d 990, 997 (9th
28 Cir. 2007) ("The district court need not consider arguments raised for the
first time in a reply brief."). Accordingly, the court will not consider
these additional assertions. The court would note, however, that on cross-
examination Picker did ask Gonzalez about the incident described in the
presentence report. He also referred to it in his closing arguments. (Trial
Tr. 424-27; *id.* at 1012). The court also notes that Booth's opinion
regarding the truthfulness of witnesses would not have materially impacted
the result of the trial given that the court specifically instructed the
jury to consider the impact of prior felonies and plea bargains in assessing
the credibility of co-defendant testimony. (*Id.* at 957-58).

1 Moore.

2 An attorney is ineffective for failing to introduce evidence
3 demonstrating his client's factual innocence or evidence that
4 "raises sufficient doubt as to that question to undermine
5 confidence in the verdict." *Avila v. Galaza*, 297 F.3d 911, 919
6 (9th Cir. 2002). An attorney is also ineffective if he fails "to
7 conduct a reasonable investigation" or to "make a showing of
8 strategic reasons for failing to do so." *Sanders v. Ratelle*, 21
9 F.3d 1446, 1456 (9th Cir. 1994).

10 The record does not support an assertion that Picker was
11 ineffective for failing to present this evidence. In fact, Picker
12 did investigate Saragosa and Moore as witnesses. At trial, Picker
13 told the court that neither Saragosa nor Moore could be located.
14 (Trial Tr. 353-56). The court directed Picker to attempt to locate
15 them one more time. (*Id.* at 354, 357). After doing so, Picker
16 reported that Moore had been located but was uncooperative, and
17 that although Saragosa had given the investigator a statement in
18 the past, he could no longer be located and in any event had not
19 been cooperative. (*Id.* at 659).

20 Roberts disputes these representations and claims that both
21 men were able and willing to testify.² He also asserts that, even
22 if the witnesses were not cooperative, he was entitled to
23 compulsory process under the Sixth Amendment.

24 _____
25 ² Roberts asserts that Picker was untruthful when he advised the court
26 that Moore and Saragosa were unavailable to testify. There is no evidence
27 that these statements were untrue. The investigator's ability to contact
28 Moore during trial does not mean he was able to contact him before trial.
And although Saragosa had been contacted by the investigator when Picker
said he had not, the court is not persuaded that Picker's statement was
untrue. Given that Picker generally understood Saragosa to be uncooperative,
his statement that Saragosa had never been contacted was at most inaccurate.

1 There is no evidence on the record that Moore was willing to
2 testify at Roberts' trial. In fact, what evidence there is (an
3 investigator's report posttrial) clearly indicates that Moore was
4 reluctant to cooperate. Nothing in that report or anywhere else in
5 the record suggests that at the time of trial Moore was willing to
6 testify on Roberts' behalf. Picker attests that Moore would not
7 testify. (Gov't Opp'n Picker Aff. ¶ 8). As Picker understood
8 Moore to be uncooperative, he made the strategic decision not to
9 compel his testimony. See *Johnson v. Tennis*, 2006 WL 4392562, at
10 *8 (E.D. Pa. 2006) (holding that strategic decision not to call
11 uncooperative witnesses fell within trial counsel's discretion and
12 citing cases in support). The court's review of Picker's
13 performance is highly deferential, and the court cannot say that
14 Picker's actions in this regard fell outside the wide range of
15 reasonable representation.

16 Saragosa attests that he never told any investigator that he
17 was unwilling to cooperate, and that he provided the investigator
18 with all the information he now provides to the court.³ (Def. Pet.
19 Ex. 12 (Saragosa Aff. ¶¶ 30-32)). He further states that Picker
20 and the investigator "had all of my contact information and knew
21 exactly where to reach me." (*Id.* ¶ 33). Even if Saragosa's
22 assertions are true, he has not stated that he was available to
23 testify at the time of Roberts' trial or that he could have been
24 reached through the contact information Picker and the investigator
25 had at that time. Assuming Saragosa was available and could have
26 been reached at the time of trial, there is still nothing in the

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28 ³ Picker asserts Saragosa never provided the investigator with the
information in his affidavit. (See Gov't Opp. Picker Aff. ¶¶ 10-11).

1 record that contradicts Picker's assertion that he was told by the
2 investigator that Saragosa was unwilling to cooperate. Picker was
3 entitled to rely on the investigator to tell him which witnesses
4 were available and cooperative and which were not. See *Wilson v.*
5 *Sirmons*, 536 F.3d 1064, 1136 (10th Cir. 2008) ("It is well-settled
6 counsel may rely on the efforts of co-counsel, investigators, and
7 experts in preparing for trial."). As with Moore, Picker's failure
8 to call a witness he believed to be uncooperative was a strategic
9 decision well within his discretion and was not outside the range
10 of reasonable representation.

11 Even if the failure to call Saragosa was not reasonable,
12 however, Roberts cannot show he was prejudiced by Picker's
13 decision. Saragosa states that he came by Roberts' house on the
14 afternoon of May 2, 2005, while Chapman was there. (Def. Mot. Ex.
15 12 (Saragosa Aff. ¶¶ 1-2)). While he was there, Saragosa claims,
16 Chapman did not appear to be afraid of Roberts and did not seem as
17 though he had been kidnaped. (*Id.* ¶ 5-6). Further, he asserts,
18 Roberts did not threaten or act violently toward Chapman, did not
19 make him do anything against his will, and did not tell Chapman he
20 could not leave. (*Id.* ¶¶ 7-9, 13). However, Saragosa does not
21 state how long he was at Roberts' house and does not otherwise
22 state that he had personal knowledge of everything that took place
23 that day.

24 Saragosa also asserts that Chapman was not restrained, had
25 several opportunities to leave, and in fact "seemed to be enjoying
26 himself and acting normal as he was drinking beer, smoking
27 marijuana, watching television and socializing." (*Id.* ¶¶ 12-14).
28 For the most part, however, such testimony would have been

1 cumulative. Nick Calcese testified that he removed the zip ties
2 from Chapman's wrists before they ate sandwiches the morning of May
3 2, 2005, and that Chapman was not restrained again after that.
4 (Trial Tr. 566-57). He also testified that Chapman smoked
5 marijuana while at the house. (*Id.* at 567). Even though Chapman
6 did not admit to being freed from restraint, he did admit to
7 smoking marijuana and eating. (*Id.* at 247-48). Accordingly,
8 Saragosa's testimony in this regard would not have added anything
9 the jury had not already heard.

10 In addition, Saragosa's affidavit includes statements as to
11 Roberts' character. Such evidence was presented by other witnesses
12 at trial and therefore would also have been cumulative. (Def. Mot.
13 Ex. 12 (Saragosa Aff. ¶¶ 21-29); see also, e.g., Trial Tr. 702-03,
14 707-08, 778-79).

15 Finally, Saragosa asserts that Roberts did not seem himself,
16 appeared afraid of Gonzalez, and kept reiterating that Saragosa
17 needed to leave the house before Gonzalez returned. (Def. Mot. Ex.
18 12 (Saragosa Aff. ¶¶ 16-20)). Such testimony would have bolstered
19 Roberts' defense of duress. However, the jury was not without
20 evidence on this point. Roberts himself testified that Gonzalez
21 had pulled a gun on him and threatened him and his family. (Trial
22 Tr. 814-15, 848-49). Moreover, another witness, Johnnie Stafford,
23 testified that Gonzalez admitted to pulling a gun on Roberts and
24 threatening him. (Trial Tr. 683-85). Accordingly, Saragosa's
25 testimony as to Roberts' state of mind would not have added
26 information that the jury did not already have. There is thus no
27 reasonable probability that Saragosa's testimony would have changed
28 the outcome of the trial. Roberts has therefore failed to show any

1 prejudice on this claim.

2 Roberts has failed to show that Picker's failure to call
3 Saragosa and Moore as witnesses fell outside the wide range of
4 reasonable representation or that it prejudiced his defense.⁴

5 B. Impeachment

6 Roberts asserts that Picker did not adequately impeach the
7 testimony of the kidnaping victim, Jared Chapman. Specifically,
8 Roberts contends that when the government stated Chapman had no
9 reason to lie about Roberts' role in the kidnaping, Picker should
10 have argued that Chapman might have been untruthful because he was
11 angry about the incident. Picker did, however, suggest reasons
12 Chapman might have been untruthful, as is clear even in the passage
13 of the trial transcript Roberts cites. (Trial Tr. 284-85). Picker
14 was entitled to make strategic decisions about his representation
15 of Roberts, and choosing the grounds on which to impeach a witness'
16 testimony is one such strategic decision.

17 For the first time in his reply, Roberts also faults Picker
18 for failing to rebut Chapman's story when it was clear his
19 testimony was inconsistent. Even if the court were to consider
20 these contentions, *see supra* n.2, the claim is without merit. The
21 jury heard Chapman's testimony and Picker cross-examined Chapman on
22 his inconsistent statements. (Trial Tr. 282-83). Although Roberts
23 claims that Picker should have reiterated the inconsistencies

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25 ⁴ Roberts argues in a conclusory fashion that Picker did not call Moore
26 and Saragosa as witnesses because he had a close personal friendship with
27 the prosecutor and was therefore unwilling to be a zealous advocate on
28 Roberts' behalf. Picker denies that his friendship caused him to represent
Roberts any less effectively. (Gov't Opp. Picker Aff. ¶¶ 12-13). Picker
fully and reasonably represented Roberts in this matter, and the record does
not support any inference that Picker limited his representation of Roberts
because of any alleged friendship.

1 during closing arguments, there is no reasonable probability that
2 doing so would have changed the jury's verdict. The jury was fully
3 aware of Chapman's testimony and heard his inconsistent statements.
4 The jury thus had all the evidence necessary to decide whether
5 Chapman was truthful. Accordingly, Roberts has not established
6 that Picker was ineffective in the manner in which he cross-
7 examined Chapman.

8 C. Suppression

9 Roberts argues that Picker was ineffective because he did not
10 move to suppress evidence found in Roberts' garbage can. He also
11 argues Picker was ineffective because, although he moved to
12 suppress the contents of a cell phone found in the car Roberts
13 drove to the Reno Hilton, he argued only that the search of the car
14 was unlawful. Roberts asserts that Picker should have argued that
15 a warrant was required to search the phone.

16 1. Garbage Can⁵

17 On Wednesday, May 4, 2005, FBI agents conducted a warrantless
18 search of Roberts' outdoor garbage can. Inside, they found several
19 items related to the kidnaping, including duct tape, zip ties, and
20 food wrappers. The agents then obtained a warrant to search
21 Roberts' home. In the house, they found several other
22 incriminating items, including a number of firearms.

24 ⁵ The government argues this claim was procedurally defaulted because
25 Roberts did not raise it on direct appeal. Roberts is not raising a Fourth
26 Amendment claim, however. Rather, he is arguing that counsel was
27 ineffective for failing to raise this Fourth Amendment claim. Roberts was
28 not required to raise his ineffective assistance of counsel claim on direct
appeal. *United States v. Braswell*, 501 F.3d 1147, 1150 n.1 (9th Cir. 2007)
(citing *Massaro v. United States*, 538 U.S. 500, 505 (2003)); see also *United*
States v. Withers, 638 F.3d 1055, 1066 (9th Cir. 2011). Accordingly, this
claim is not procedurally defaulted.

1 At trial, Special Agent Glenn Booth testified that the agents
2 had located the garbage can by the street in front of Roberts'
3 house. (Tr. 139). In his petition, Roberts disputes that his
4 garbage can was placed on the street for collection. Rather, he
5 argues, it was obscured from view within the curtilage of his home.
6 Roberts filed several affidavits stating that his customary
7 practice was to keep the garbage can next to his home except for
8 Sunday evenings, when he would place it out for collection the next
9 day. Some affidavits also attest that the can was not out for
10 collection on either the day of the warrantless search, Wednesday,
11 May 4, 2005, or the day before, Tuesday, May 3, 2005. Although the
12 affidavits submitted by the defendant state that at the time of the
13 search the garbage was collected on Mondays, the government has
14 presented compelling evidence establishing the day of collection
15 was Tuesday.

16 On April 3, 2012, the court conducted an evidentiary hearing
17 in order to resolve certain material factual disputes raised by the
18 pleadings.

19 The evidence is insufficient to establish that Roberts ever
20 told Picker about the information and witnesses he now presents.
21 Roberts did not testify that he did so at the evidentiary hearing.
22 And while Roberts asserts generally in his response to the
23 government's supplement (#422) that he "did bring the information
24 to counsel's attention," the only evidence in the record on this
25 point is Roberts' affidavit, and the affidavit states only that
26 Roberts "told Marc Picker to object to the government's use of the
27 evidence that is being challenged [but that] Mr. Picker declined to
28 do so." (Doc. # 404, Def. Reply Ex. D (Roberts Aff. ¶ 19)). In

1 contrast, Picker attests that while he understood the search of the
2 garbage can to be "an important issue to Mr. Roberts," he does "not
3 recall Mr. Roberts providing [him] any verifiable information or
4 witness names that would have contradicted the testimony that the
5 trash can was located on the sidewalk when it was initially
6 searched." (Doc. #421, Gov't Supp. Att. 7 (Picker Aff. ¶¶ 4-5)).
7 Therefore the court concludes that Roberts has failed to establish
8 that he provided Picker with sufficiently reliable and credible
9 witnesses to rebut the evidence Picker had in his possession, which
10 included two photographs, introduced as Exhibit 2 at the
11 evidentiary hearing, that showed the garbage can in the location
12 where the agents testified they found it. (See Doc. #442, Olson
13 Aff. ¶¶3-5). Picker reviewed that evidence, along with the agents'
14 testimony, and concluded "that the warrantless search was legal in
15 that the garbage can was located on public property and that the
16 photographs of its location when found were accurate." (*Id.* ¶ 4).
17 Therefore the court concludes that Picker's failure to further
18 investigate and file a motion to suppress did not fall below an
19 objective standard of reasonableness.

20 Even if Picker had been aware of Roberts' contentions and was
21 ineffective for failing to further investigate the issue, Roberts
22 cannot show that he suffered prejudice as a consequence. The
23 evidence was persuasive and credible that Special Agents Glenn
24 Booth and Michael West located Roberts' garbage can on the curb in
25 front of Roberts' house, next to the driveway. The evidence
26 presented by Roberts was insufficient to impeach that testimony.

27 The credible evidence is that the trash can was located on the
28 curb at the time the government agents searched its contents.

1 There is no objectively reasonable expectation of privacy in trash
2 put out for collection. *California v. Greenwood*, 486 U.S. 35, 37,
3 39-40 (1988). A "warrantless search and seizure of garbage left
4 for collection outside the curtilage of a home" thus does not
5 violate the Fourth Amendment.⁶ *Id.* at 40-41. Therefore the court
6 concludes that Roberts' Fourth Amendment rights were not violated
7 during the search of the garbage can. Roberts therefore cannot
8 show that any failure on the part of his attorney Marc Picker to
9 file a motion to suppress prejudiced his defense.

10 Roberts further asserts that he had an expectation of
11 privacy in his garbage, pointing to the various measures he took to
12 protect the trash from third parties. Roberts' assertion that even
13 if the can were out for collection, the search violated his rights
14 because he had a reasonable expectation of privacy in the can is
15 without merit. The Supreme Court has clearly held such an
16 expectation of privacy is not reasonable. *California v. Greenwood*,
17 486 U.S. 35, 37, 39-40 (1988).

18 2. Cell Phone

19 While Picker did file a motion to suppress evidence found on a
20 cell phone seized from the car Roberts had been driving, Roberts
21 asserts he should have argued that a warrant was required to search
22 the phone. On direct appeal, Roberts argued that the court erred
23 in admitting the cell phone's contents. The Court of Appeals held
24 that any error was harmless. (See Doc. #366 (9th Cir. Mem. Disp.
25 Dated Mar. 16, 2009, at 4)). The Ninth Circuit has held that

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27 ⁶ Roberts attempts to distinguish the holding of *Greenwood* on the
28 grounds that the officers had probable cause to search the Roberts' trash
can as well as the cooperation of the trash collector. Those facts,
however, were not relevant to *Greenwood's* holding.

1 admission of the cell phone's contents into evidence did not
2 prejudice Roberts.

3 D. Speedy Trial

4 Pursuant to the stipulations of the parties, Roberts' trial
5 was continued several times. Roberts previously asserted before
6 both this court and the Ninth Circuit that the continuances
7 violated his speedy trial rights. Although Picker filed a motion
8 to dismiss on these grounds, Roberts argues that he failed to make
9 certain arguments and present certain evidence that would have led
10 to a different result.

11 A defendant may not use § 2255 to relitigate issues that were
12 decided on direct appeal. *United States v. Redd*, 759 F.2d 699, 701
13 (9th Cir. 1985). The Ninth Circuit expressly rejected Roberts'
14 claim that his speedy trial rights were violated. In particular,
15 the court held that Roberts consented to most of the continuances
16 and that the delay was not solely attributable to the government
17 but also "to defendants' trial preparation time, co-defendants
18 changing their pleas, and Roberts' dismissal of his attorney."
19 (Doc. #366 (9th Cir. Mem. Disp. Dated Mar. 16, 2009, at 3)).

20 In his § 2255 motion, Roberts raises a number of allegations
21 about the adequacy of the stipulations to continue, unethical dual
22 representation of his interests by his co-defendants' attorneys,
23 and the government's withholding of evidence in order to
24 deliberately create a delay and secure the testimony of his co-
25 defendants.

26 The Court of Appeals has already determined that Roberts'
27 speedy trial rights were not violated because he consented to the
28 continuances and contributed to the delay. The Ninth Circuit

1 acknowledged a presumption of prejudice in Roberts' favor but
2 nonetheless held, based on the other factors, that no speedy trial
3 violation had occurred. The court will not revisit this issue.
4 See *Redd*, 759 F.2d at 701.

5 Roberts faults Picker for failing to impeach Graham's
6 testimony at the motion to dismiss hearing when Graham testified
7 that Roberts consented to most of the continuances.

8 All but one of the continuances occurred while Roberts was
9 represented by Graham. The trial was continued for the last time
10 after Graham withdrew from representation but before Picker was
11 appointed. At the hearing on the motion to dismiss, this court
12 called Graham to the stand. The court asked whether the
13 representations in the stipulations that the defendants consented
14 to the requests to continue were true. Graham responded "yes."
15 (Tr. of Aug. 17, 2006, Hr'g 23). The court then asked at what
16 point Roberts began to indicate that he did not want any more
17 continuances. (*Id.* at 24). Graham responded that he was concerned
18 about the attorney-client privilege. (*Id.* at 24). The court asked
19 Roberts whether he would waive the privilege. (*Id.* at 24).
20 Roberts refused. (*Id.* at 24). In the end, the court credited
21 Graham's testimony that he had consulted with Roberts before almost
22 every continuance was requested and granted. (Tr. of Aug. 17,
23 2006, Hr'g 26).

24 Roberts argues Picker should have presented several pieces of
25 evidence bearing on Graham's credibility.

26 First, Roberts presents a visitation log for the Washoe County
27 Jail, where Roberts was housed before trial, for the time period
28 February 16, 2006 to May 5, 2006. The log shows that Graham did

1 not visit Roberts during that time period. Roberts argues that
2 this proves Graham could not have obtained Roberts' consent for the
3 April 2006 continuance and that Picker should have pointed this
4 out. However, whether Graham visited Roberts between February and
5 May 2006 is irrelevant, because the April 2006 stipulation did not
6 represent that the defendants joined in the request. The court's
7 question to Graham was whether he had consulted with Roberts before
8 filing the stipulations that indicated the defendants were joining
9 in the request.⁷ (See Doc. # 94). Graham's answer in the
10 affirmative did not pertain to stipulations, such as that filed on
11 April 10, 2006, that did not indicate the defendants were joining
12 in the request. Picker's failure to raise a meritless argument was
13 not ineffective.

14 Second, Roberts asserts that Picker should have impeached
15 Graham on a prior statement, which Roberts claims was inconsistent
16 with his testimony at the motion to dismiss hearing. At the
17 October 19, 2005, calendar call, the defendants' attorneys,
18 including Graham, requested a continuance, although Graham
19 indicated that he had not yet consulted with Roberts. The court
20 granted the request and continued the trial. Graham's testimony at
21 the motion to dismiss hearing was not inconsistent with his October
22 19, 2005, statement. Graham was not asked whether he had consulted
23 with Roberts before every continuance. He was asked whether he

25 ⁷ To the extent Roberts claims his failure to join in this request
26 equates with a violation of his speedy trial rights, the Ninth Circuit has
27 already squarely rejected this claim. (See Doc. #366 (9th Cir. Mem. Disp.
28 Dated Mar. 16, 2009, at 3)) (in finding that no speedy trial violation had
occurred, explicitly recognizing that Roberts did not agree to all the
continuances). It may not be relitigated here. *United States v. Redd*, 759
F.2d 699, 701 (9th Cir. 1985).

1 consulted with him before those requests indicating the defendants
2 joined in the request. Further, the October 19, 2005, continuance
3 was supported by a signed stipulation on October 26, 2005,
4 reflecting that the defendants joined in the request. Graham
5 testified that this statement meant he had he consulted with
6 Roberts. The court found this contention credible. That Graham
7 did not consult with Roberts before the October 19, 2005, hearing
8 does not mean he did not consult with Roberts before the October
9 26, 2005, stipulation was submitted.

10 The remaining evidence Roberts asserts Picker should have
11 introduced includes his own letters to Graham stating that he did
12 not want the trial continued, and affidavits and letters from his
13 parents echoing these concerns.⁸ However, the court was well aware
14 of Roberts' contention that he had not agreed to the continuances.
15 (See Tr. of Aug. 10, 2006, Hr'g 3, 18-19; Tr. of Aug. 17, 2006,
16 Hr'g 18-19; Mot. Dismiss Dated July 22, 2006, at 2; Def. Mot.
17 Dismiss Dated June 13, 2006; Tr. of June 13, 2006, Calendar Call
18 6). In fact, evidence was presented at the hearing on the motion
19 to dismiss showing that Roberts resisted the continuances,
20 including a tape-recorded conversation in which Roberts said that
21 he believed his speedy trial rights were being violated and that he
22 did not want the trial continued any more.⁹ (See Tr. of Aug. 17,

24 ⁸ Roberts argues in his reply that Picker should have presented
25 evidence showing that his co-defendants had also not agreed to continuances.
26 The court will not consider this argument raised for the first time in
Roberts' reply. See *supra* n.2.

27 ⁹ Roberts asserts that Picker should have used this recording at the
28 motion to dismiss hearing. However, the recording was already before the
court because the government had introduced it. There was therefore no
reason for Picker to use it.

1 2006, Hr'g 15-16). The court chose to credit Graham's testimony
2 that he had consulted with Roberts before almost every continuance
3 was requested. There is thus no reasonable probability that had
4 Picker attempted to impeach Graham in the manner suggested by
5 Roberts that the result would have been any different.¹⁰

6 Roberts has thus failed to show that Picker rendered
7 ineffective assistance of counsel in connection with the speedy
8 trial issues in this case, or that any of Picker's actions
9 prejudiced Roberts' defense.

10 Finally, Roberts argues that this court should find prejudice
11 based on the totality of Picker's alleged errors. Considering the
12 totality of Picker's representation, the court does not find that
13 Picker rendered ineffective assistance of counsel, or that his
14 representation prejudiced Roberts. Accordingly, Roberts' first
15 ground for relief based on Picker's alleged ineffective assistance
16 of counsel is **DENIED**.

17 II. Sentencing Enhancements

18 Roberts argues pursuant to *Apprendi v. New Jersey*, 530 U.S.
19 466 (2000) and *Jones v. United States*, 526 U.S. 227 (1999) that his
20 Fifth and Sixth Amendment rights were violated when the court
21 enhanced his sentence based on facts that were not presented to and
22
23
24

25 ¹⁰ Roberts also asserts for the first time in his reply that the
26 government used Graham's testimony knowing it was a lie. To the extent this
27 is intended to be a standalone claim and not simply a reassertion of
28 Picker's alleged failings, the court will not consider this contention
raised for the first time in the reply. See *supra* n.2. Even if the court
were to consider it, however, there is no evidence that Graham's testimony
was perjured or that the government knew it to be so, as discussed above.

1 determined by the jury.¹¹

2 *Apprendi* and *Jones* held that any fact (other than a prior
3 conviction) that increases the maximum statutory penalty for a
4 crime must be submitted to the jury and proven beyond a reasonable
5 doubt. *Apprendi*, 530 U.S. at 490; *Jones*, 526 U.S. at 243 n.6. In
6 light of these holdings, the Supreme Court in *United States v.*
7 *Booker*, 543 U.S. 220 (2005) held that application of sentence
8 enhancements based on facts not submitted to the jury violated the
9 Sixth Amendment under the then-mandatory Sentencing Guidelines.
10 The Court also held, however, that such constitutional concerns
11 would not be present if the Sentencing Guidelines were advisory.
12 *Id.* at 233. The Court held that the Guidelines are advisory,
13 thereby “permitting a district court to impose a sentence anywhere
14 within the range established by the statute of conviction without
15 violating the Sixth Amendment.” *United States v. Treadwell*, 593
16 F.3d 990, 1017 (9th Cir. 2010). Thus, a court may constitutionally
17 apply sentence enhancements based on facts not presented to the
18 jury so long as the defendant is sentenced below the statutory
19 maximum for his or her offense. *Id.* at 1017-18 (citing *United*
20 *States v. Raygosa-Esparza*, 566 F.3d 852, 855 (9th Cir. 2009)); see
21 also *United States v. Ameline*, 409 F.3d 1073, 1077-78 (9th Cir.
22 2005) (*en banc*). The “statutory maximum . . . is the maximum
23 sentence a judge may impose solely on the basis of the facts
24 reflected in the jury verdict or admitted by the defendant.”
25 *Cunningham v. California*, 549 U.S. 270, 283 (2007).

26
27 ¹¹ Although nonconstitutional sentencing errors are not cognizable on
28 a § 2255 motion, *United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir.
1994), Roberts’ claim alleges that the court committed a constitutional
violation in sentencing him. It is therefore cognizable.

1 The jury found Roberts guilty of kidnaping and conspiracy to
2 kidnap. It also found him guilty of using a firearm during a crime
3 of violence. The maximum sentence for all three convictions was
4 life imprisonment. See 18 U.S.C. § 1201(a), (c); id. § 924(c);
5 *United States v. Dare*, 425 F.3d 634, 640 (9th Cir. 2005) (holding
6 that the statutory maximum sentence for a § 924(c) offense is life
7 imprisonment). No facts beyond those necessarily found by the jury
8 were required in order to sentence Roberts to life in prison.
9 Roberts was sentenced to 117 months' imprisonment on the kidnaping
10 counts and 84 months' imprisonment on the gun count. The sentences
11 on the kidnaping counts were concurrent. Roberts' sentence was
12 therefore below the maximum statutory penalty authorized by the
13 jury's verdict.

14 Roberts also asserts that the sentence enhancements were
15 "elements" of his offense, which were required to be presented to
16 and proven to the jury. Roberts was subject to sentencing
17 enhancements for his role as a leader or organizer of the
18 kidnaping, for obstruction of justice, and for carrying a firearm.
19 The enhancements were sentencing factors, not elements of his
20 offense. See *Apprendi*, 530 U.S. at 494 n.19 (explaining that
21 sentencing factors are those that support a specific sentence
22 within the range authorized by the jury's finding, and that
23 sentencing enhancements that increase a sentence beyond the maximum
24 authorized statutory sentence are the functional equivalents of
25 "elements"). The enhancements did not increase Roberts' sentence
26 beyond the maximum authorized statutory sentence, which was life in
27 prison, and therefore they were not elements that were required to
28 be proven to the jury.

1 As Roberts' sentence was below the statutory maximum for his
2 crimes, no constitutional violation occurred when the court applied
3 sentencing enhancements based on facts not presented to and
4 determined by the jury. As there was no constitutional violation,
5 Roberts' motion on his second ground for relief is **DENIED**.

6 III. Law Library Access

7 Roberts argues that his Fourteenth Amendment rights were
8 violated because he did not have access to a law library when
9 preparing to represent himself at sentencing. The government
10 contends that this claim is procedurally defaulted because it was
11 not argued on direct appeal, and Roberts has not identified any
12 cause for or prejudice from such failure.

13 "If a criminal defendant could have raised a claim of error on
14 direct appeal but nonetheless failed to do so, he must demonstrate
15 both cause excusing his procedural default, and actual prejudice
16 resulting from the claim of error." *United States v. Johnson*, 988
17 F.2d 941, 945 (9th Cir. 1993).

18 "Attorney error short of ineffective assistance of counsel . .
19 . does not constitute cause and will not excuse a procedural
20 default." *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). In fact,
21 "cause for a procedural default on appeal ordinarily requires a
22 showing of some external impediment preventing counsel from
23 constructing or raising the claim." *Murray v. Carrier*, 477 U.S.
24 478, 492 (1986). Roberts has not asserted that his appellate
25 counsel was ineffective in any way. Nor has Roberts alleged that
26 any external impediment prevented appellate counsel from raising
27 this claim on appeal. Therefore, Roberts has not demonstrated
28 cause for the procedural default.

1 Roberts has also not explained in what ways his self-
2 representation was harmed by the lack of a law library; he makes
3 only a conclusory assertion that he could not adequately prepare.
4 Roberts has not demonstrated that he was actually prejudiced by the
5 alleged lack of access to a law library. Roberts has failed to
6 support this claim.

7 Accordingly, as to this claim Roberts has shown neither cause
8 nor prejudice to excuse the procedural default, Roberts' motion on
9 the third ground for relief is **DENIED**.

10 IV. Ineffective Assistance of Counsel - Attorney Loren Graham

11 Roberts argues that pretrial counsel Graham was ineffective
12 for failing to assert and protect his speedy trial rights.¹² He
13 asserts that in particular Graham failed to make the government
14 comply with discovery in time for trial and failed to investigate
15 why the government and co-defendants were asking for continuances.
16 He also argues that Graham should have been able to proceed to
17 trial as early as the summer of 2005 because all relevant evidence
18 had been disclosed by that time. He argues the repeated
19 continuances prejudiced him in two ways: (1) the government was
20 able to supersede the indictment against him, adding the § 924(c)
21 charge; and (2) the government was able to secure the testimony of
22 his co-defendants against him.

23 There is no evidence that Graham did not agree to the
24 continuances or that the government and co-defendants' counsel
25 misled him into signing the stipulations. The government did not
26

27 ¹² In his reply, Roberts adds other actions Graham should have taken -
28 such as moving to suppress the cell phone - to show that the totality of his
actions have prejudiced him. The court will not consider these contentions
raised for the first time in the reply. See *supra* n.2.

1 initiate any of the continuances, (Tr. of Aug. 17, 2006, Hr'g
2 27:20-25), and Roberts consented to all of the continuances until
3 it became clear that his co-defendants were pleading, (*id.* at 26:6-
4 27:16). After this, there were sound strategic reasons for the
5 continuances.¹³ (*Id.* at 27:17-20). There is no evidence to suggest
6 that the continuances were made for the sole purpose of securing
7 testimony against Roberts or that the government withheld discovery
8 in order to delay the trial. Further, Roberts' assertion that
9 Graham should have been able to proceed to trial earlier because
10 the case was "simple" is without merit.

11 Roberts has failed to show that Graham rendered ineffective
12 assistance of counsel or that he was prejudiced by Graham's
13 conduct. Accordingly, his fourth ground for relief is **DENIED**.

14 V. False Witness Testimony

15 Roberts asserts that at trial the government knowingly
16 presented the false testimony of six witnesses: (1) Anthony
17 Gonzalez; (2) Frank Phillips; (3) Serena Crawford; (4) Jacob
18 Belford; (5) Nick Calcese; and (6) Jared Chapman.

19 A criminal defendant's due process rights are violated when
20 the government knowingly introduces false evidence or fails to
21 correct the record when false evidence is presented. *Napue v.*
22 *Illinois*, 360 U.S. 264, 269-70 (1959); *Mooney v. Holohan*, 294 U.S.
23 103 (1935); *Hayes v. Brown*, 399 F.3d 972, 974, 978 (9th Cir. 2005).
24 To prevail on a *Mooney-Napue* claim, the defendant must show that

25
26 ¹³ Roberts asserts there were no strategic reasons to continue trial
27 from July 11, 2005, to May 26, 2006, and requests an evidentiary hearing to
28 explain. The court determines no evidentiary hearing is required on this
point as the record supports a conclusion that there were strategic reasons
for the continuances, and the Court of Appeals has reached the same
conclusion.

1 “(1) the testimony (or evidence) was actually false, (2) the
2 prosecution knew or should have known that the testimony was
3 actually false, and (3) that the false testimony was material.”
4 *United States v. Zuno-Arce*, 339 F.3d 886, 889 (9th Cir. 2003).
5 “[T]he prosecution’s failure to correct false testimony requires a
6 new trial only if there is any reasonable likelihood that the false
7 testimony could have affected the judgment of the jury.” *Maxwell*
8 *v. Roe*, 628 F.3d 486, 499-500 (9th Cir. 2010) (internal punctuation
9 and quotation marks omitted) (quoting *Hayes*, 399 F.3d at 984-85).
10 Under this standard, “the question is not whether the defendant
11 would more likely than not have received a different verdict with
12 the evidence, but whether in its absence he received a fair trial,
13 understood as a trial resulting in a verdict worthy of confidence.”
14 *Hayes*, 399 F.3d at 984.

15 A. Anthony Gonzalez

16 Roberts asserts that Anthony Gonzalez was untruthful on the
17 stand and that the government knowingly presented his false
18 testimony.

19 First, Roberts argues that Gonzalez gave false testimony when
20 he said that he was not receiving any benefits as a result of his
21 testimony.¹⁴ When the prosecutor asked Gonzalez whether he was

22
23 ¹⁴ Benefits received by a government witness through a plea bargain must
24 be disclosed to the defendant, and the defendant must be allowed to cross
25 examine the witness on the details of the plea agreement and other benefits.
26 See *United States v. Mitchell*, 502 F.3d 931, 967 (9th Cir. 2007) (defendant
27 must be allowed to cross examine a witness to make clear to the jury what
28 benefit or detriment will flow from his or her testimony); *United States v.*
Yarbrough, 852 F.2d 1522, 1537 (9th Cir. 1988) (“an accomplice who has plead
guilty may testify against non-pleading defendants . . . [and] courts have
. . . relied on cross-examination to uncover any false testimony that might
be given”; testimony is valid as long as “the jury is informed of the exact
nature of the agreement, defense counsel is permitted to cross-examine the
accomplice about the agreement, and the jury is instructed to weigh the

1 advised of any benefit he could receive from providing assistance
2 to the government, Gonzalez responded "no." (Trial Tr. 296:15-18).
3 The prosecutor then asked Gonzalez whether he had signed an
4 agreement with the government, to which Gonzalez responded "yes."
5 (*Id.* at 296:21-23). The prosecutor asked Gonzalez if he recalled
6 the terms of the agreement, and Gonzalez responded yes. (*Id.* at
7 296:24-297:11). The prosecutor therefore corrected Gonzalez's
8 initial testimony.

9 However, Roberts' counsel then asked Gonzalez what he expected
10 to get out of his testimony. (*Id.* at 410:8-15). Gonzalez replied,
11 "I hope that they may give me a couple of points off. But I know
12 that, ultimately, it's up to the judge and to the government. I
13 don't really have any expectations." (*Id.* at 8-11). There was no
14 further discussion of the benefits Gonzalez had received or
15 expected to receive. Roberts' counsel did not object to Gonzalez's
16 testimony.

17 Where a witness who has received benefits or will receive
18 benefits denies as much on the stand, the government is under an
19 obligation to correct the false testimony. See *United States v.*
20 *Alli*, 344 F.3d 1002, 1007 (9th Cir. 2003) (holding that government
21 breached its duty of candor to correct testimony of witness who
22 claimed he was not receiving any benefits, but holding that under a

23 _____
24 accomplice's testimony with care"). Benefits that must be disclosed include
25 "any lenient treatment." *Benn v. Lambert*, 283 F.3d 1040, 1057 (9th Cir.
26 2002) (*Brady* violation occurred where government failed to disclose that it
27 had arranged for a witness to be released from jail without being charged
28 with a traffic offense and for the dismissal of unrelated burglary charges).
Roberts has not asserted that the government failed to disclose Gonzalez's
plea agreement or any of the other benefits Gonzalez received as part of his
testimony. In fact, the record reflects that Gonzalez's plea agreement was
disclosed to Roberts by the government. (Tr. of Aug. 17, 2006, Hr'g 29:16-
25).

1 plain error standard the breach had not affected the defendant's
2 substantial rights because there was ample evidence other than the
3 witness' testimony to establish defendant's guilt and prosecutor
4 had not relied on witness' testimony in closing).

5 Gonzalez did not give false testimony about the benefits he
6 expected to receive. The plea agreement required Gonzalez to plead
7 to the conspiracy to kidnap charge. (See Gonzalez Plea Agm't ¶
8 1.1). The remaining charges were to be dismissed at sentencing.
9 The plea agreement noted that the government would consider filing
10 a motion for downward departure based on substantial assistance and
11 would recommend a sentence at the low end of the guidelines. But
12 the agreement also clearly stated that the court was not obligated
13 to grant either of these requests and could sentence Gonzalez up to
14 the statutory maximum. (*Id.* at 1.15, 1.18). Gonzalez did not give
15 false testimony when he stated that he hoped to get a "couple
16 points off" but that it was up to the government and the court.
17 Picker had access to the plea agreement for his cross examination
18 of Gonzalez. Insofar as the § 924(c) charge is concerned, there is
19 no evidence before the court that the government had entered into
20 an agreement with Gonzalez to withhold charging him with a § 924(c)
21 violation in exchange for his testimony.

22 In addition, there is substantial and compelling evidence in
23 the record, independent of Gonzalez's testimony, to support
24 Roberts' conviction. Chapman testified in great detail as to
25 Roberts' involvement in the kidnaping and his use of a weapon, as
26 did Roberts himself.

27 Second, Roberts asserts that Gonzalez gave false testimony
28 when he testified it was Roberts' drug deal and drug money, and

1 that Roberts had a gun in California. Roberts has provided no
2 evidence aside from his own assertion that these statements were
3 false. Inconsistencies between witnesses' testimonies go to
4 credibility, which is a determination for the jury; the mere fact
5 that one witness's testimony contradicts another's does not
6 conclusively establish that the prosecutor knew the witness was
7 lying. *United States v. Zuno-Arce*, 44 F.3d 1420, 1422-23 (9th Cir.
8 1995). Roberts has failed to establish that Gonzalez's testimony
9 was false or that the government knowingly presented false
10 testimony.

11 The court will not consider other claims of Roberts raised for
12 the first time in his reply.

13 Accordingly, the court finds that Roberts has failed to show
14 that Gonzalez gave materially false testimony or that the
15 government's conduct in presenting the testimony to the jury
16 violated Roberts' constitutional rights.

17 B. Frank Phillips

18 Before trial, Frank Phillips told investigators that he knew
19 Gonzalez was going to Sacramento to meet with Chapman and buy
20 Ecstasy. (Second Supp. to Petition Ex. A). At trial, Roberts
21 called Phillips as a witness. Roberts asserts that in the
22 following exchange, Phillips denied any knowledge of Gonzalez's
23 plan:

24 Q: You, prior to May 1st of 2005, even the day before
25 that, did you know that Anthony Gonzalez was going
to be meeting with Jared Chapman in Sacramento.

26 A: Actually I did not.

27

28 Q: Did you know he - that he was going to see Jared
Chapman?

A: Nope. Not at all.

Q: Did you know why Anthony Gonzalez was meeting with

1 Jared Chapman?

2 A: Nope.

3 Q: [Did you tell investigators t]hat Anthony was
4 looking to find a good source of ecstasy?

5 A: No.

6 Q: That's not true?

7 A: No.

8 (Tr. 717-19).

9 In citing this exchange, however, Roberts leaves out important
10 parts of the testimony. Specifically, in between those questions
11 Picker asked Phillips about his earlier statement that "Anthony was
12 going down to Sacramento to meet with Jared Chapman." Phillips
13 explained that he knew Gonzalez was looking for an Ecstasy source
14 but he did not know the "particular time, that particular day with
15 Jared that's what they were going there to do, that weekend." (*Id.*
16 at 718-19). Because Picker brought out Phillips' alleged prior
17 inconsistent statement and Phillips explained the inconsistency,
18 the government had no obligation to examine further.

19 Even assuming that Phillips' pretrial and trial statements
20 were inconsistent, the fact that a witness made a prior
21 inconsistent statement does not necessarily mean that the witness'
22 statement on the stand is false. "Mere inconsistencies in
23 testimony by government witnesses do not establish the government's
24 knowing use of false testimony." *United States v. Griley*, 814 F.2d
25 967, 971 (4th Cir. 1987); see also *United States v. Baker*, 850 F.2d
26 1365, 1372 (9th Cir. 1988) (a witness' prior inconsistent statement
27 does not by itself establish "that the prosecutor knew the prior
28 statement was true but used it anyway"). And Phillips' statements
29 at Roberts' sentencing hearing did not establish that his trial
30 testimony was false.

1 Further, Phillips' testimony on this issue was not material.
2 A *Napue* violation requires a court to ask whether there is "any
3 reasonable likelihood that the false testimony could have affected
4 the judgment of the jury." *Libberton v. Ryan*, 583 F.3d 1147, 1164
5 (9th Cir. 2009). Roberts asserts that Phillips' testimony was
6 crucial to show that Roberts had no motive to kidnap Chapman and
7 did not act to secure some benefit to himself. 18 U.S.C. §
8 1201(a); *United States v. Vetere*, 663 F. Supp. 381 (S.D.N.Y. 1987).
9 At most, however, Phillips' testimony would have supported a theory
10 that it was Gonzalez's drug deal and Gonzalez's money that was
11 stolen, and thus the kidnaping was to secure some benefit to
12 Gonzalez. Roberts was charged with kidnaping and aiding and
13 abetting in the kidnaping. Even if Roberts' theory was accepted by
14 the jury, the evidence clearly established that Roberts aided and
15 abetted in the kidnaping. There is no reasonable likelihood that
16 this testimony affected the verdict of the jury.

17 C. Serena Crawford

18 Roberts argues that Serena Crawford gave false testimony and
19 that the government not only failed to correct her testimony but
20 also repeated it in closing arguments. He cites to an Eleventh
21 Circuit case that held "the failure of the prosecutor to correct
22 the perjured testimony of the government's essential witness, and
23 her capitalizing on it in her closing argument, when defense
24 counsel is also aware of the perjury and does not object to it,
25 requires a new trial." *Demarco v. United States*, 928 F.2d 1074,
26 1075-76 (11th Cir. 1991).

27 Roberts asserts that before trial Crawford stated that when
28 she went over to Roberts' house around 6:30 p.m. on May 2, 2005,

1 she "could sense that he was stressed out . . . [and] wasn't
2 normal." At trial, Roberts' attorney asked Crawford about her
3 meeting with Roberts on the afternoon of May 2, 2005, in which she
4 gave Roberts money in the alley behind his house. Picker did not
5 ask Crawford about defendant's demeanor at that time. (Tr. 734-
6 35). Picker then asked when Crawford next saw or spoke to Roberts,
7 and Crawford indicated that she spoke to Roberts by phone later
8 that day. At that point the prosecutor asked how Roberts sounded,
9 and Crawford said, "Okay." (Tr. 736-37).

10 Roberts asserts that Crawford's characterization of his
11 demeanor as "okay" was inconsistent with her earlier statement that
12 he seemed "stressed." Crawford's statements are not inconsistent
13 as they refer to different interactions she had with Roberts. When
14 Crawford said Roberts seemed stressed out, she had been referring
15 to their in-person meeting in the alley behind his house. When she
16 said at trial that Roberts was "okay," she was referring to her
17 later telephone conversation with him. Even if this statement was
18 incorrect, Roberts has failed to show that the witness gave false
19 testimony or that the government failed to correct perjured
20 testimony.¹⁵ See *Baker*, 850 F.2d at 1372.

21 D. Nick Calcese, Jacob Belford, and Jared Chapman

22 Roberts claims that Calcese testified falsely about Gonzalez
23 giving him a gun belonging to Roberts, that Belford gave false
24 testimony about his involvement in the kidnaping, and that Chapman
25 testified falsely about Roberts using a gun. Inconsistent

26

27 ¹⁵ Roberts cites Crawford's statements at his sentencing and in a
28 recent affidavit to prove her statements at trial were false. As both of
these statements came after trial, neither proves that government knowingly
presented false testimony at trial.

1 statements do not necessarily establish that a witness is lying.
2 See *Baker*, 850 F.2d at 1372. Contradictory statements bear on
3 credibility and are a matter for impeachment. See *United States v.*
4 *Zuno-Arce*, 44 F.3d 1420, 1422-23 (9th Cir. 1995) (inconsistencies
5 go to credibility, which is a determination for the jury, and the
6 mere fact that a witness' testimony contradicts another's does not
7 conclusively establish that the prosecutor knew the witness was
8 lying). Many of the alleged contradictory statements highlighted
9 by Roberts came *after* trial, at Roberts' sentencing. There is no
10 credible evidence that the prosecution knowingly presented false
11 testimony to the jury.

12 Accordingly, Roberts has failed to show that the government
13 knowingly presented or failed to correct false evidence at trial.
14 Roberts' fifth ground for relief is **DENIED**.

15 **Conclusion**

16 In accordance with the foregoing, Roberts' motion to vacate,
17 set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (#377)
18 is hereby **DENIED**.

19 IT IS SO ORDERED.

20 DATED: This 9th day of July, 2012.

21 
22 _____
23 UNITED STATES DISTRICT JUDGE